

Magistrate's Court. I realise the predicament in which the counsel and the applicants are facing. Be that as it may, I have to dismiss this application on this ground alone. I am leaving it open for the applicants to apply to Johore Baru High Court for further orders.

Order accordingly.

Solicitors: *Roslani A.J. Ariffin & Abbas.*

CH'NG LIAN ENG v. PUBLIC PROSECUTOR.

[A.Cr. J. (Edgar Joseph Jr.) December 3, 8 & 9, 1982]

[Penang – Criminal Appeal Nos. 73 of 1981 & 74 of 1981]

Criminal Law & Procedure – Rape of girl aged 13 years and 11 months – Appeal against conviction and sentence – Conviction affirmed – Sentence reduced from 3 years to 8 months.

Penal Code, s. 376 – Rape of girl aged 13 years 11 months – Appeal against conviction and sentence.

The appellant was convicted of rape of a girl aged 13 years and 11 months in contravention of section 376 of the Penal Code and sentenced to 3 years' imprisonment. He appealed against the said conviction and sentence. The Public Prosecutor, on the other hand, appealed on the ground of inadequacy of sentence.

The girl said that there were two acts of rape – both at the Rest House, Penang, on two different nights in July 1979. As regards the first of these acts, she was frightened into submission and was, therefore, not a consenting party, whereas, as to the second, she was a consenting party, having been seduced by the appellant with a promise that he would divorce his wife and marry her. The appellant claimed that the case against him had been framed and that no sexual intercourse took place at any time. The learned President found in favour of the girl's version and rejected that of the appellant.

Held: (1) contrary to the finding of the learned President, there was corroboration of the girl's evidence. This was in the form of love letters which passed between the appellant and the girl. There was also a manifest lie on the part of the appellant that his relationship with the girl was purely platonic. The appeal against conviction was therefore dismissed;

(2) justice would be best served if the sentence of 3 years were reduced to 8 months. The Public Prosecutor's appeal against sentence was dismissed.

Cases referred to:

- (1) *Haw Tua Tau v. Public Prosecutor* [1981] 2 M.L.J. 49.
- (2) *Teng Kum Seng v. Public Prosecutor* [1960] M.L.J. 225.
- (3) *R. v. Renphrey* (1964) Cr. L.R. 671.
- (4) *R. v. Sapherson* (1963) Cr. L.R. 66.

A CRIMINAL APPEALS.

R. Rajasingam for the appellant.

Mohamed Nordin bin Hj. Sulaiman (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

B

Edgar Joseph Jr. J.: This appellant was convicted of rape of a girl aged 13 years and 11 months in contravention of section 376 of the Penal Code and sentenced to three years' imprisonment. Against this conviction and sentence he has appealed. There is also an appeal by the Public Prosecutor alleging inadequacy of sentence.

C

It is unnecessary to set out the facts as these appear sufficiently from the judgment of the learned President.

D

Before me, the convictions have been attacked on a number of grounds, all of them raising questions of fact. They may be consolidated under one head, namely, that the circumstances of the case were such that it was wholly unsafe to convict on the uncorroborated testimony of the girl who, it was said, was not a witness of truth.

E

Now the issue in the court below was simple. The girl said there were two acts of rape – both at the Rest House, Penang, on two different nights in July, 1979. As regards the first of these acts, she was frightened into submission and was, therefore, not a consenting party, whereas, as to the second, she was a consenting party, having been seduced by the Appellant, with a promise that he would divorce his wife and marry her.

G

The Appellant, on the other hand, said that the case against him had been framed and that no sexual intercourse took place at any time. So the sole question which the learned President had to determine at the end of the defence case was whether or not the prosecution had proved beyond all reasonable doubt that sexual intercourse took place between the Appellant and the girl at a time when she was under 14 (*Haw Tua Tau v. Public Prosecutor*)⁽¹⁾.

H

I

Since the charge merely alleged a single act of rape in July without specifying which of the two acts was charged, it was vague and confusing. However, as the Appellant was represented and was clearly aware of what was charged against him and as his defence was one of a bare denial,

I do not consider he was in any way prejudiced. Applying section 422 of the Criminal Procedure Code I hold that the defect in the charge was cured and if any authority is needed I would refer to the case of *Teng Kum Seng v. Public Prosecutor*⁽²⁾. I shall, however, assume in the Appellant's favour, that what was charged was the second alleged act of sexual intercourse which was with the girl's consent.

In a long and careful judgment, the learned President made very strong findings in favour of the girl's version whilst rejecting that of that Appellant and went on to give his reasons for those findings. In the circumstances, sitting on appeal, my powers to intervene are circumscribed by well settled authorities which show that unless the Appellant can demonstrate that those findings are unreasonable or cannot be supported having regard to the evidence or are plainly wrong or perverse, the appeal must stand dismissed out of this court.

Mr. Rajasingam has taken me through the evidence with a tooth comb and at great length in an attempt to persuade me that the girl was not a witness of truth and in spite of his carping criticisms, I regret I find myself unable to agree with him. On an issue such as this so much depends upon the impression which the girl and the Appellant made upon the learned President who had the inestimable advantage of seeing and hearing them give their evidence, an advantage which is denied to me.

I must, however, differ with the learned President on one point and that concerns his finding that there was no corroboration of the girl's evidence. In my view, there are corroboration of the most potent kind in the shape of evidence of opportunity and disposition on the part of the Appellant to have sexual intercourse with the girl. I refer to the evidence of the Appellant having dated the girl, a fact which he admitted, and love letters which passed between him and the girl. There was also a manifest lie on the part of the Appellant that his relationship with the girl was purely platonic.

My concluding observation on the appeal against conviction, is that when the Appellant, a married man with two children and aged 23, chose to date a girl of 13, he was playing with fire and it is proverbial that those who play with fire should not complain if they get burnt.

A The appeal against conviction is dismissed.

The Appellant is on firmer ground as regards his appeal against sentence. Whilst it is true that this was perhaps a case which involved the exploitation of an immature girl by an older man I cannot overlook the fact that the girl was inviting trouble in going out with the Appellant in his car at night knowing he was a married man and then being prepared to share his company in the privacy of a room in a Rest House. These mitigating facts were clearly overlooked by the learned President. There is also the long interval of time which has elapsed since the commission of the offence — nearly 3½ years — and the Appellant's good character both before and after conviction. Moreover, this was not a case where the Appellant chose to ignore the law knowing full well that this is a law for the protection of young girls against themselves (*R. v. Renphrey*)⁽³⁾.

In *Sapherson*⁽⁴⁾ a married man aged 27 with several previous convictions and separated from his wife admitted several offences with a girl of 15. It was suggested that the girl was experienced and was the real instigator. The court observed that "in view of the wide age discrepancy it was firmly of the view that this is a case for imprisonment" but the sentence of two years' imprisonment imposed by the trial judge "was out of scale ... something in the nature of six months would have been more appropriate."

In all the circumstances, I think that justice will be best served if I reduce the sentence to eight months, which I hereby do. The Public Prosecutor's appeal against sentence is, in consequence, dismissed.

*Conviction affirmed;
Sentence reduced.*

H Solicitors: *R. Rajasingam & Co.*;

I